

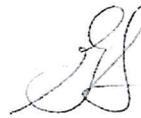
MEMORANDUM

TO: Pepper Pike Planning Commission

FROM: George Smerigan, City Planner

DATE: June 1, 2021

RE: **Medina Creative Housing
Use Variance Request
Professional Opinion Report**



Background

The Ursuline Academy of Cleveland owns a 42-acre parcel, identified as Permanent Parcel No. 871-08-009. Although the address of the subject parcel is listed as 2600 Lander Road, the parcel does not have frontage on Lander Road. Instead, the subject parcel has approximately 811 feet of frontage on the north side of Fairmount Boulevard. The subject site is zoned U-2 Public Buildings District and has been zoned U-2 Public Buildings District for an extended period of time.

To the west and south of the subject site the adjacent properties are zoned U-1 Single-Family Dwelling District and consist of single-family homes fronting on Windy Hill Drive and Fairmount Boulevard. To the north of the subject site the adjacent property is zoned U-1A Townhouse District and consists of single-family attached dwellings constructed as part of The Luxe at Pepper Pike and Edgewood Trace developments. To the east the adjacent property is zoned U-2 Public Buildings District and is occupied by the Ursuline College campus.

For many years the site contained a number of uses that were contained in a cluster of buildings located in the center of the subject parcel. Those uses included the Wasmer Gallery, an art gallery; Daley Hall, a dining hall; a chapel used by the Ursuline Sisters of Cleveland; business offices used by the Ursuline Sisters; classrooms used by Ursuline College; and residences for members of the Ursuline Sisters. Some of the uses established and operating on the subject site do not conform to the list of permitted uses for the U-2 Public Buildings District, but were determined by the City to be legal nonconforming uses as provided in Chapter 1268 of the Pepper Pike Zoning Code.

In 2016 the Ursuline Sisters made application to the City to construct a new smaller facility intended to replace the old cluster of buildings that housed the activities on the subject site. In 2017, the City authorized the substitution of the smaller single building for the larger cluster of buildings and granted site development plan approval for construction of the new facility, now referred to as Merici Crossings. That site development plan approval established the required building and parking setbacks, access and parking provisions, landscaping, and site lighting for the nonconforming use.

In February 2021, Medina Creative Housing, through its attorney Jennifer Wintner, filed an application for a use variance with the City requesting authorization to extend the current usage of the site to include housing and related services for adults with intellectual and developmental disabilities. Pursuant to the provisions of Section 1262.03 governing variances, the request by Medina Creative Housing was scheduled for a public hearing before the Planning Commission and notice was published and sent to adjacent property owners. A total of approximately eight (8) hours of public hearings were held on March 1, 2021 and April 19, 2021 at which time the applicants, property owners, and others were given the opportunity to provide testimony regarding the requested variance. Numerous letters and emails were also sent to the City by interested parties commenting on the variance request.

As part of the application by Medina Creative Housing, Ms. Wintner addressed the criteria listed in Section 1262.03 regarding the required findings for evaluating variance requests. Medina Creative Housing described and later provided evidence of a lease agreement with The Ursuline Academy of Cleveland to document their standing to make the variance application. In addition, both Sister Ritamary Welsh, as President of the Ursuline Sisters of Cleveland, and John Slagter, legal counsel for the Ursuline Sisters, testified on the record that Medina Creative Housing has been given authority by the property owner to seek the use variance on the subject site. The applicant also provided concept plans for the design and layout of the proposed facility. Both the applicant and the representatives of the property owner concurred on the record that the concept plans were presented for illustrative purposes only. The drawings do not meet the standards for site development plans and the current application is for a use variance only and not site development plan approval.

Testimony

Dianne DePasquale-Hagerty, Executive Director of Medina Creative Housing, testified that the proposed project consists of twenty-five (25) one and two-bedroom single story attached dwelling units intended to provide independent living for adults with

intellectual and developmental disabilities. The twenty-five (25) dwelling units would be attached in ten (10) buildings. Support for the residents would be tailored to individual needs. The residents would be assisted by individual direct care providers who would not reside on the subject site. She testified that the nature of the assistance provided by the direct support providers would vary based on the needs of each individual resident. She stated that ninety-nine percent (99%) of the residents do not drive, and that transportation services would be provided. She testified that Medina Creative Housing has a 99-year lease with the Ursuline Academy of Cleveland to occupy three (3) acres of the 42-acre site.

Attorney Jennifer Wintner testified that the existing nonconforming use on the subject site is mission based multi-family housing. She noted that the overall lot coverage on the 42 acres with the existing Merici Crossings and the proposed project would be approximately sixteen percent (16%) of the total land area. She also stated that with sixty-eight (68) dwelling units in the Merici Crossings and the twenty-five (25) proposed dwelling units, the total number of dwelling units on the subject site would be ninety-three (93) which would be a net density of 2.2 dwelling units per acre. She asserted that the old motherhouse was larger in both lot coverage and dwelling unit density than the combination of Merici Crossings and the proposed Medina Creative Housing project. She identified other properties within the City that have substantially greater lot coverage and unit density, concluding that the proposed use of the subject site would not be out of character with land coverage or density within the City of Pepper Pike.

Ms. Wintner noted that the lease agreement was executed in June 2020, which was before the adoption of the recent amendments to the U-2 Public Buildings District so they did not have prior knowledge of the zoning restrictions. Attorney Wintner testified that the subject site is the only property zoned U-2 Public Buildings District in the City of Pepper Pike that contains permanent housing. She further testified that there is no existing zoning district in the Pepper Pike Planning and Zoning Code that would permit or accommodate the proposed use.

In her written analysis of the variance criteria submitted with the application, Attorney Wintner makes the following assertions:

- There can be no beneficial use of the property without the variance.
- Any active use of that land must be physically compatible with the motherhouse as well as programmatically compatible with the Sisters' mission.
- The requested variance is not substantial.
- The variance will not alter the character of the neighborhood, but it will allow the continuation of a use that has been in place for the last sixty-three years.

- The proposed architecture for the new homes is single family in character as well as scale, making it compatible with existing homes in the area.
- The variance will not adversely impact the delivery of governmental services.
- That housing of the type proposed cannot be accomplished without a variance.
- That granting the variance will be consistent with the spirit and intent of the Planning and Zoning Code and would provide substantial justice for applicant and property owner.
- The general intent of the U-2 district is to permit uses that benefit the public, and it is in the public interest to have housing that can accommodate the community's most vulnerable citizens.
- That the circumstances are unique to the subject site and are not shared by any other property because the Ursuline Sisters' property is the only U-2 District property on which permanent housing is located, so it is the only property zoned U-2 District for which this same variance could be requested.

Attorney John Slagter testified that rental of the units would be restricted to individuals with intellectual and developmental disabilities. He further testified that the Ursuline Sisters intend to provide support for the proposed residents of the project and therefore desire the proposed use to be located close to the motherhouse. Attorney Slagter asserted that any ambiguity in the zoning regulation should be resolved in favor of the property owner. He stated that the issue is a variance request and that the site plan is only conceptual and for informational purposes and if the variance is approved a site plan will need to be submitted in conformance with recently adopted Chapter 1275 of the Planning and Zoning Code. He testified that the Ursuline Sisters are exploring a conservation easement on 8 – 10 acres at the northern end of the property. Attorney Slagter asserted that the circumstances of the property are unique and that the approval of the variance would not alter the character of the neighborhood.

Sister Ritamary Welsh testified that the sisters will sponsor two (2) of the twenty-five (25) proposed housing units.

Sister Susan Durkin and Mr. Thomas Chema both testified that the Ursuline Sisters explored other uses on the 42 acres, including a senior housing development, but that there are currently no projects under consideration on the subject site other than the Medina Creative Housing project.

A number of persons testified regarding the desirability and need for facilities such as the one being proposed and its importance to the intellectual and developmentally disabled community. There was testimony that such a facility would provide a public benefit.

Other parties testified regarding suggested impacts on property values, possible disturbance of wetlands, the impacts of light trespass and glare from Merici Crossings, possible traffic impacts, possible drainage impacts, the existence of an adjacent power line easement, public safety concerns, possible changes to the character of the neighborhood, and concerns regarding increased density. The comments made reflected the concerns of neighboring property owners, but did not include the submission of substantiating evidence by qualified experts. In some cases, the concerns and comments dealt with issues which might be valid considerations in a different forum, such as during site development plan review, but which are not probative to the matter of the requested variance.

Analysis

This matter comes before the Planning Commission as a request for a use variance. The cover letter from attorney Wintner that accompanied the application states that they are making application for *“a variance of new Zoning Code Section 1266.03 pertaining to permitted uses in U-2 districts”* and their application is being *“made pursuant to Section 1262.03(c)(2) of the Zoning Code which authorizes the Planning Commission to permit the extension of a non-conforming use on a lot occupied by such use at the time of the passage of the Zoning Code.”*

Section 1268.02(b) of the Planning and Zoning Code states that *“a nonconforming use shall not be extended or expanded.”* It is clearly the intent of the Code, as expressed in Chapter 1268, to limit and eventually amortize and eliminate nonconforming uses. Chapter 1268 contains provisions that are intended to specifically limit the size, scope, nature, and location of nonconforming uses.

The prohibition against extension of a nonconforming use set forth in Section 1268.02(b) is modified by Section 1262.03(c)(2) which, as quoted above, grants the Planning Commission authority to permit an extension or relocation of a nonconforming use on the lot it occupies. The Planning and Zoning Code provides no similar authority to the Planning Commission to permit a nonconforming use to be expanded or enlarged, but limits the Commission’s authority to merely permitting a nonconforming use to be extended or relocated, without enlargement or expansion, on the same parcel that it presently occupies. Therefore, the Commission may authorize, subject to appropriate findings and determinations as required by Section 1262.03(d), an existing nonconforming use to be extended or relocated to a different portion of the same property that it currently occupies, but has no authority to permit a nonconforming use to be extended to another or different parcel, nor to permit any expansion or enlargement, in any form, of any nonconforming use.

Since the Commission's authority is limited, it must first determine what is the nonconforming use and the what is its extent and scope. Both in her written documentation and in her testimony under oath, Ms. Wintner characterized the existing nonconforming use as mission based multi-family housing. She is only partially correct. The existing motherhouse, referred to as Merici Crossings, contains housing units. The architectural and structural style of the building is consistent with the definition of a multi-family building. The building, in addition to other uses, contains thirty-four (34) suites, each containing two sleeping quarters for a total of sixty-eight (68) units. Those individual living quarters occupy approximately fifty percent (50%) of the total building area. The remaining floor area is a combination of mixed-use and garage space. Those mixed-uses include, among other things, a communal kitchen and dining area as well as offices, a nursing station, and meeting rooms.

The housing on the subject site cannot be considered to be conventional multi-family housing. The building does not consist of condominiums or apartments that can be purchased, rented, or occupied by the general public. What exists on the subject site is institutional housing or group quarters for a very limited special segment of the population; specifically, members of the order of the Ursuline Sisters of Cleveland.

Based upon the documentation provided and the testimony given by the applicants during the public hearings, Medina Creative Housing is proposing to construct institutional housing or group quarters for another very limited special segment of the population. In their case that segment or group consists of adults with intellectual and developmental disabilities. This type of institutional housing or group quarters is similar in character to that provided by Merici Crossings, although the special segment of the population served is different and the style of the housing units is single-family attached versus multi-family.

The type of institutional housing or group quarters being proposed is different from a commercial operation, such as an assisted living facility, which is licensed by the State of Ohio as a medical provider. The Medina Creative Housing facility requires no State permits or licenses, since it is merely an institutional housing or group quarters facility and not providing medical care to its residents. Although residents can contract with Medina Creative Housing for direct care providers, there is no obligation or requirement to do so, and most direct care providers are individually contracted by the families of residents.

The subject property before the Commission for consideration is the 42-acre parcel referred to as Permanent Parcel No. 871-08-009. It is the only parcel which can legally be before the City since it is the only parcel that contains the existing nonconforming use. There has been significant discussion regarding placement of the proposed project

on three (3) acres leased from the Ursuline Academy of Cleveland by Medina Creative Housing. No separate three-acre parcel exists, and if it did it would not be an eligible target for extension or relocation of the existing nonconforming use.

The lease agreement and testimony by officials of the Ursuline Sisters of Cleveland and their legal counsel have sufficiently documented the authority of Medina Creative Housing to make application for the use variance as the authorized agent of the Ursuline Academy of Cleveland and the future operator of the proposed facility. Medina Creative Housing as a separate entity does not have a nonconforming use on the subject site and therefore could not extend what does not exist. Likewise, the Code clearly limits any extension of a nonconforming use to solely that parcel which it occupies. There is no authority by which the Commission could authorize extension of a nonconforming use onto a new or different parcel. Any extension of the existing nonconforming use must be on the same parcel as the current nonconforming use. Any lot split would violate that requirement.

The Commission is without authority to expand or enlarge any nonconforming use. Therefore, nothing that would increase the density, scope, area, or nature of the nonconforming use can be approved. The original nonconforming institutional housing or group quarters contained a total of one hundred fifty (150) dwelling units on 42 acres. The current facility contains a total of sixty-eight (68) dwelling units. While the Commission can permit an extension or relocation of the existing facility to another portion of the subject site, it has no authority to permit the total number of dwelling units to exceed a maximum of one hundred fifty (150) or a density of 3.57 dwelling units per acre. Doing so would constitute an expansion or enlargement of the nonconforming use by increasing its size and/or intensity of use. Again, any attempted subdivision of the subject site would result in a violation of these standards.

The same limitation exists with regard to building ground coverage and use of the site. While the Commission has the power to permit the use to be shifted on the site, it has no authority to permit the total area dedicated to the nonconforming use to be increased beyond its initial size and area. The original nonconforming use occupied a total of 8.44 acres of the subject site (see Original Building Ground Coverage map). That calculation is generous since at least a portion of the 8.44 acres was occupied by conforming uses such as the chapel and classrooms. The current nonconforming use occupies a total of 3.82 acres of the subject site (see Current Building Ground Coverage map). Therefore, any approved extension of the current nonconforming use must not occupy more than 4.62 acres of the subject site or else it would constitute an expansion or enlargement rather than a mere extension.

Section 1262.03(d) identifies a number of criteria to be considered by the Planning Commission as part of the findings necessary to determine whether a variance should

be approved. While no single factor is determinative, the Commission is required to weigh all of them in arriving at a decision.

Whether the property will yield a reasonable return and have a beneficial use without the variance.

While the applicant claims that no beneficial use of the property can be made without the variance, that claim is clearly not accurate. There is an existing nonconforming use currently making beneficial use of the property. In addition, the property owner has the ability to further utilize the property for any of the uses permitted under the provisions of the U-2 Public Buildings District. This criterion is not met.

Whether the variance is substantial.

If the use variance granted is for twenty-five (25) dwelling units limited to occupancy by individuals with intellectual and developmental disabilities and such extension does not occupy more than 4.62 acres of land and does not violate the building setbacks established by the Planning Commission when it granted the extension for Merici Crossings, then the variance would not be substantial. If the proposed extension occupies a greater land area or reduces the established setbacks for the nonconforming use, then it could be considered to be substantial.

Whether the essential character of the neighborhood will be altered or the use and whether it would interfere with the use and development rights of adjoining properties.

Assuming that the proposed use is limited to twenty-five (25) dwelling units covering less than 4.62 acres of land and located in compliance with the established building setbacks for the existing nonconforming use, then there should be no change to the character of the neighborhood or interference with the use or rights of adjoining properties as the City has previously determined that a smaller and less dense version of the prior nonconforming use is appropriate at the established setbacks.

Whether granting the variance would adversely affect the delivery of governmental services.

If there is no expansion or enlargement of the nonconforming use, there should be no adverse impacts on the delivery of governmental services.

Whether the property owner purchased the property with knowledge of the restriction.

The property has been in the same ownership for many years and the nonconformity has existed for some time. This standard is not determinative.

Whether the applicant's situation can be resolved by a method other than a variance.

The Planning and Zoning Code does not contain specific provisions for nor an established zoning district that specifically addresses or permits institutional housing or group quarters. Therefore, a simple rezoning is not a viable option. The applicant would have to seek some combination of a text and map amendment to resolve the issue. While that approach may be more cumbersome than the current variance request, it does constitute another option for addressing their proposed use of the property.

Whether variance would be consistent with the spirit and intent of the Zoning Code would provide substantial justice.

It is worth noting that the U-2 Districts in the City are not without institutional housing or group quarters. There is institutional housing and group quarters for a very limited and special segment of the population in the form of dormitories on the adjacent Ursuline College property, which is also zoned U-2 District, albeit those facilities provide temporary rather than permanent housing for full-time students. Similarly, there is also temporary institutional housing and group quarters for a very limited and special segment of the population on the New Directions campus, which is also zoned U-2 District. Historically, there was also formerly temporary institutional housing and group quarters for a very limited and special segment of the population on the U-2 District zoned Beech Brook property. While all of these examples are nonconforming uses, it would seem disingenuous to claim that extending the existing institutional housing and group quarters for another very limited and special segment of the population on the basis set forth above would be averse to the spirit and intent of the Code or would be inconsistent with providing substantial justice.

Whether the variance will be contrary to the general purpose, intent, and objective of the U-2 District.

The U-2 Public Buildings District is by its very nature an institutional district. The permitted uses are all institutional in character. Providing limited institutional housing or group quarters within the District, for special very limited and defined groups and under the standards and conditions identified could be considered consistent with the purpose and intent of the district, particularly given that there are several instances where they already exist in some form.

Whether the variance arises from a condition or circumstance that is unique to the property and not shared by other properties in the U-2 District or in the immediate vicinity of the subject site.

The applicant is correct that there are no other U-2 District properties that have nonconforming permanent institutional housing or group quarters that could reasonably be extended to another portion of the subject site. In that regard, no

other U-2 District property has identical circumstances and therefore this situation is unique.

Whether the situation is caused by the Zoning Code or the actions of the applicant.

The situation is a result of the disjunction between the historic use of the property by the Ursuline Sisters of Cleveland and the list of permitted uses in U-2 Districts. This criterion is also not determinative.

Whether approval of the variance would adversely impact public health, safety, or general welfare.

If the approval is limited to an extension on the same site as the existing nonconforming use and if such approval provides for no greater density or increase in total number of dwelling units, no greater land coverage, and compliance with the establish setbacks for the nonconforming use, then there should be no adverse impact.

Whether the variance requested is the minimum necessary to afford relief.

Again, if the variance is limited to providing institutional housing or group quarters for an identified and very limited segment of the population, not exceeding the density, unit count, ground coverage, or setbacks of the original nonconforming use, then the variance is being effectively minimized. If the land area, density, or unit count is exceeded, or if the setbacks are not maintained, then the variance would exceed the minimum necessary and would be inappropriate.

Determination and Recommendation

It is my professional opinion that the use variance requested for the extension of the existing nonconforming institutional housing and group quarters on the 42-acre Ursuline Academy of Cleveland site can be approved provided that:

1. The approval is for a maximum of twenty-five (25) dwelling units limited to providing housing for adults with intellectual and developmental disabilities in a single-family attached configuration to be operated by Medina Creative Housing in a manner consistent with the formal representations made to the Planning Commission.
2. That the ground coverage of the buildings, parking, and improvements associated with the extension shall not exceed a maximum of 4.62 acres so that the maximum combined ground coverage of the existing nonconforming use and the proposed extension of the nonconforming use do not exceed the

ground coverage of the original nonconforming use, which has been determined to be 8.44 acres.

3. That the extension maintains the established minimum front setback from the northerly right-of-way line of Fairmount Boulevard of 250 feet, the established minimum side setback from the westerly property line abutting the adjacent U-1 Single Family Residential properties fronting Windy Hill Drive of 300 feet, the minimum side setback from the easterly property line abutting the Ursuline College property of 50 feet, and the rear setback line abutting the U-1A Townhouse District of 650 feet.
4. That the extension and the existing nonconforming use remain on the same 42-acre parcel, which parcel shall not be subdivided so as to increase the net density or ground coverage of the nonconforming uses.
5. That a site development plan for the extension shall be submitted for approval in conformance with all of the standards and criteria set forth in Chapter 1275 Site Development Plans.
6. That upon completion of the extension, the entire property shall comply with the thirty percent (30%) open space requirement of Section 1270.02(b).

It is my further professional opinion that without compliance with all of the above listed stipulations, the requested variance for extension of an existing nonconforming use would not meet the appropriate standards necessary for the Planning Commission to make a positive finding and determination and that the variance request would have to be denied.

Planning Commission Memorandum
 Medina Creative Housing
 Use Variance Request
 Professional Opinion Report
 June 1, 2021
 Page 12



Planning Commission Memorandum
 Medina Creative Housing
 Use Variance Request
 Professional Opinion Report
 June 1, 2021
 Page 13

